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No. 97-16

In the Supreme Court of the United States

OCTOBER TERM, 1996

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether respondents' challenge to the Wayne National Forest Land and Resource Management Plan (LRMP) developed by the United States Forest Service in accordance with the National Forest Management Act of 1976 presents a justiciable controversy.

2. Whether the court of appeals erred in holding that the LRMP at issue in this case was inconsistent with applicable legal requirements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 105 F.3d 248. The opinion of the district court granting summary judgment (Pet. App. 10a-48a) is reported at 845 F. Supp. 485. An earlier opinion of the district court (Pet. App. 49a-65a) is unreported. The administrative appeal decisions of the Chief of the United States Forest Service (Pet. App. 66a-77a, 78a-130a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. Petitions for rehearing were denied on April 7, 1997. Pet. App. 131a-132a. The

petition for a writ of certiorari was filed on July 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Agriculture's Forest Service is responsible for managing the 191 million acres of land that comprise the National Forest System. See 58 Fed. Reg. 19,369 (1993). Under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (NFMA), the Secretary of Agriculture is required to "develop, maintain, and, as appropriate, revise land and resource management plans [LRMPs or forest plans] for units of the National Forest System." 16 U.S.C. 1604(a). The Act directs the Secretary to "provide for public participation in the development, review, and revision of land management plans," 16 U.S.C. 1604(d), and establishes certain criteria to which LRMPs must conform, 16 U.S.C. 1604(e) and (f).

Under current Forest Service regulations, a forest plan is, in essence, a programmatic statement of intent that operates prospectively in a manner analogous to a zoning ordinance. Forest plans are intended to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner." 36 C.F.R. 219.1(a). They "guide all natural resource management activities and establish management standards and guidelines for the National Forest System." 36 C.F.R. 219.1(b). The plans "determine resource management practices, levels of resource production and management, and the availability and suitability of

lands for resource management." *Ibid.* An LRMP includes forest-wide management standards and guidelines, 36 C.F.R. 219.13-219.27, and establishes management area prescriptions applicable to future activities in each area of the forest, 36 C.F.R. 219.11(c). The standards and guidelines and the management area prescriptions govern future project-level decisions having ground-disturbing impacts. Plans also are required to identify those areas of the forest *not* suitable for timber production, 36 C.F.R. 219.14, and to establish the maximum allowable sale quantity (ASQ) of timber for a forest over the life of a plan, 36 C.F.R. 219.16.[1] Plans are generally revised on a 10-year cycle but must be revised at least every 15 years. 36 C.F.R. 219.10(g); 16 U.S.C. 1604(f)(5)(A).

Because individual land use decisions must be consistent with the forest plan, a plan provision that forbids particular activities within a national forest (or portion thereof) is dispositive: such activities cannot go forward. See 16 U.S.C. 1604(i) ("Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans."). If a proposed site-specific activity is not consistent with the forest plan, the Forest Service may "[m]odify the proposal to make it consistent with the forest plan"; "[r]eject the proposal"; or "[a]mend the plan to permit the proposal." 53 Fed. Reg. 26,836 (1988).

To date, most forest plans generally have not identified specific ground-disturbing activities (such as

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[1] ASQ is defined as the "quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan." 36 C.F.R. 219.3.

timber-cutting or road-building) that are permitted or required to occur without further scrutiny. Rather, the agency undertakes an individualized assessment of the likely environmental effects of a proposed on-the-ground activity. See 53 Fed. Reg. 26,832 (1988); 58 Fed. Reg. 19,370-19,371 (1993); *Sierra Club* v. *Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). Thus, even if a proposed site-specific activity is consistent with the LRMP, it will not go forward if it is determined (either in isolation or upon consideration of its cumulative effects together with other individual land use decisions) to have unacceptable environmental impacts.

2. The Forest Service is authorized by the NFMA to utilize both "evenaged" and "unevenaged" timber harvesting techniques. An "evenaged" management technique is one "aimed at creating a regeneration of trees which are essentially the same age." Pet. App. 2a. One evenaged technique is clearcutting, which involves the removal of all trees within a given area at the same time. *Ibid.* Other evenaged techniques are seed tree and shelterwood cutting, in which some trees in an area are left standing for a time to assist in the generation of new trees around them, and then are cut down to leave only younger trees of the same age. *Id.* at 15a. The NFMA directs the Secretary to "insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where" specified criteria have been satisfied. 16 U.S.C. 1604(g)(3)(F). The Secretary is required, in particular, to ensure that evenaged management techniques "are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation,

and esthetic resources, and the regeneration of the timber resource." 16 U.S.C. 1604(g)(3)(F)(v). The Act further provides that clearcutting may be used as a method of evenaged harvesting only where "it is determined to be the optimum method * * * to meet the objectives and requirements of the relevant land management plan." 16 U.S.C. 1604(g)(3)(F)(i).

3. a. This case involves a challenge to the LRMP developed for the Wayne National Forest in southern Ohio and approved by the Regional Forester in January 1988. In accordance with current planning regulations, the Wayne LRMP divided the forest into various management areas, identified forest lands not suitable for timber production, adopted standards and guidelines to guide subsequent harvesting decisions and to protect riparian areas, and established an overall ASQ for timber production from the Forest. However, the plan did not authorize or implement any activities that would have immediate on-the-ground impacts.

The Wayne LRMP addressed the issue of aggregate timber production by designating 126,107 (out of 176,787) federally owned acres in the forest as suitable for timber production, and by setting the ASQ at an average of 7.5 million board feet per year (*i.e.*, 75 million board feet total) during the first decade of the plan. See Plan 4-7, 4-180; Record of Decision (ROD) 18, 19; Pet. App. 33a.[2] The plan "provide[d] for evenaged management on 80 percent of the suitable forest land and for uneven-aged management on the remaining 20 percent." ROD 18; see Plan 3-5 ("Approxi-

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[2] We have lodged a copy of the Land and Resource Management Plan for the Wayne National Forest, as well as the Record of Decision, with the Clerk of this Court.

mately 21 percent of the suitable timber land will be managed under an uneven-aged silvicultural system," with "even-aged management on the remaining 79 percent of the suitable acres"); Pet. App. 16a.[3]

Although the LRMP designated 126,107 acres within the forest as suitable for timber production, it projected that only 7,835 acres would be harvested during the first decade of the plan. Plan 4-180. Of that acreage, it was projected that 5,075 acres would be harvested by evenaged methods and 2,760 acres by unevenaged methods. *Ibid.*; see Pet. App. 16a. The LRMP explained the rationale for timber management and harvesting techniques; the respective advantages of seed tree, shelterwood, and clearcutting for particular locations and types of species; and the circumstances that would render clearcutting the optimal method to meet the overall objectives of the LRMP. See Plan App. C; Pet. App. 20a-26a.

The Regional Forester issued a Record of Decision (ROD) explaining the forest plan, as well as his reasons for selecting it from among seven alternatives. The ROD observed that "[t]he emphasis of the Forest

[3] Appendix C to the LRMP explained the Forest Service's choice of vegetation management practices for each "management area" of the forest. For management areas 3.1, 3.2, 3.3, and 6.1, Appendix C projected the use of evenaged techniques as the primary method of timber harvesting. Plan App. C-6 to C-7; see also Plan 4-90 to 4-91, 4-98, 4-104, 4-118 to 4-119. Management area 3.1 contains 28,086 acres of land found to be suitable for timber harvesting; management area 3.2 contains 13,362 such acres; management area 3.3 contains 48,553 such acres; and management area 6.1 contains 9,641 such acres. See Plan 4-168, 4-170, 4-172, 4-174. Taken together, those management areas contain a total of 99,642 suitable acres—79% of the 126,107 acres identified by the Plan (see Plan 4-7) as suitable for timber harvesting.

Plan is not on site-specific decisions or specific outputs." ROD 38. It explained:

> As a long-range strategy for the Forest, this Forest Plan and the accompanying FEIS [final environmental impact statement] are programmatic in nature. During implementation, when the various projects are designed, more site-specific analyses will be developed. These analyses may result in environmental assessments, environmental impact statements or categorical exclusions and, possibly, an amendment or revision of the Forest Plan.

Ibid.

b. Respondents Sierra Club and Citizens Council on Environmental Control (Citizens Council) each filed an administrative appeal from the Regional Forester's decision approving the plan.[4] In his decision rejecting the Sierra Club's administrative appeal, the Chief of the Forest Service emphasized that the plan did not incorporate binding decisions to undertake individual timber sales. Thus, in addressing the contention that the plan would permit timber harvesting on land that should have been designated as not suitable for timber production (see 16 U.S.C. 1604(k)), the Chief observed that, "[d]uring implementation of the Forest Plan, the costs and benefits of different ways to carry out timber sales are evaluated on a sale-by-sale basis." Pet. App. 70a; see also *id.* at 75a ("the Forest Plan represents only one level in decision making about the management of the Wayne

[4] Pursuant to Forest Service regulations, the decision by a Regional Forester to approve an LRMP is subject to administrative appeal by members of the public. See 36 C.F.R. Pt. 217, 219.10(d).

National Forest and * * * final decisions are yet to be made on many matters of evident concern to the appellants"). With respect to clearcutting in particular, the Chief explained that

> [t]he optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest to achieve specific management objectives. However[,] the analysis and final decision on the appropriateness of even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

Id. at 76a. In rejecting the appeal filed by Citizens Council, the Chief similarly emphasized that decisions regarding individual projects were not dictated by the plan and would be made only after site-specific analysis. See *id.* at 98a-99a, 100a, 103a.

4. Subsequent to their administrative appeals, respondents Sierra Club and Citizens Council filed suit challenging the Wayne Forest LRMP. They argued, *inter alia*, that the forest plan was biased towards timber harvesting and, in particular, towards clearcutting. With respect to standing, respondents alleged in their complaint that their members visit the Wayne National Forest for recreational, avocational, occupational, and professional purposes. Pet. App. 134a. Specifically, they alleged that their members "visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging." *Id.* at 134a-135a. The complaint further alleged that the

actions of the Forest Service would "result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne." *Id.* at 135a. The requested relief included, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law." *Id.* at 144a. Petitioner Ohio Forestry Association intervened as a defendant in the district court.

The district court granted the government's motion for summary judgment. Pet. App. 10a-48a. Neither petitioner nor the government contended that the suit was non-justiciable. The district court's only reference to the issue was its statement that, "[i]n those management prescriptions which include clearcutting, there is a determination that clearcutting is the optimum method to meet the objectives and requirements of the Plan and the rationale for that determination is explained. This determination will substantially affect future decisions and is ripe for review." *Id.* at 20a (citation omitted).

The district court addressed and rejected respondents' challenges to the general policy determinations reflected in the plan, while noting that questions concerning the application of general policies to particular circumstances could be "deferred until there is a proposal of a specific timber sale at a specific site." Pet. App. 19a. The court stated that respondents' concerns about the consequences of clearcutting "were addressed by the Forest Service and that the applicable statutes and regulations

provide for a further assessment of these concerns on a site-specific basis when the Forest Service proposes to pursue specific projects in the forest." *Id.* at 17a. The district court also held that the Forest Service had acted reasonably in designating the total acreage suitable for timber production and in setting the ASQ at an average of 7.5 million board feet per year. See *id.* at 27a-37a.[5]

5. The court of appeals reversed. Pet. App. 1a-9a. The court first held that respondents' facial challenge to the forest plan was suitable for adjudication.[6] The

[5] The court noted in the latter regard that "[t]he ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors, including the budget of the Forest Service, the market for wood products and other conditions which may limit the practicality of offering sales at levels developed in the Plan." Pet. App. 33a.

[6] Relying principally on the intervening decision in *Sierra Club* v. *Robertson*, 28 F.3d 753 (8th Cir. 1994), the government contended in the court of appeals that respondents' suit was non-justiciable, both because respondents lacked standing to sue and because their claims were not ripe for adjudication. See Gov't C.A. Br. 21-30. The government did not argue that a forest plan is *never* subject to judicial challenge. The government's brief acknowledged that "[i]f, for example, a plan incorporated a final decision to close a specific area to off-road vehicles, the plan itself could result in imminent concrete injury to a party with an interest in the use of off-road vehicles in that area." *Id.* at 24-25. The government contended, however, that the Forest Service's promulgation of the LRMP for the Wayne National Forest did not give rise to actual or imminent injury to respondents, since the plan did not mandate that any particular activities would go forward, and since any proposed site-specific action would be scrutinized to ensure compliance with applicable environmental laws. *Id.* at 25-27.

Petitioner Ohio Forestry Association did not file a brief in the court of appeals. Rather, it filed a motion indicating its desire to join in, and adopt, the arguments made in the brief for the federal parties to the case. The Sixth Circuit granted that motion.

court found that respondents had standing to sue, asserting that LRMPs "represent significant and concrete decisions that play a critical role in future Forest Service actions." *Id.* at 4a. The court also held that respondents' claims were ripe for review, concluding that respondents "need not wait to challenge a specific project when their grievance is with an overall plan." *Ibid.*

On the merits, the court concluded that the forest plan was arbitrary and capricious because "the planning process was improperly predisposed toward clearcutting." Pet. App. 5a. After quoting the text of the NFMA requiring that evenaged management be "consistent" with the protection of natural resources and regeneration of the timber resource (see 16 U.S.C. 1604(g)(3)(F)(v)), the court expressed the view that the NFMA "contemplates that even-aged management techniques will be used only in exceptional circumstances," and it faulted the Wayne LRMP on the ground that the Forest Service "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. The court asserted as well that "the Forest Service has a history of preferring timber production to other uses," and that "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." *Id.*

at 7a. The court of appeals reversed the district court's order granting summary judgment for the government and remanded the case for further proceedings. *Id.* at 8a.[7]

ARGUMENT

In the government's view, the court of appeals erred both in finding respondents' challenge to the Wayne LRMP to be justiciable independent of any particular site-specific activity that would cause concrete injury to respondents' members, and in holding that the 1988 plan for the Wayne National Forest was inconsistent with applicable legal requirements. For several reasons, however, we do not believe that this case warrants the Court's review, especially in its present interlocutory posture. Although forest management planning is guided by planning regulations, each LRMP is forest-specific and contains management decisions pertinent to that particular forest. In the present case, moreover, the Forest Service's current management practices in the Wayne National Forest differ so significantly from the projections in the decade-old LRMP challenged by respondents that prolonged litigation regarding the validity of the plan would not be an efficient use of the resources of the

[7] Judge Batchelder concurred separately. Pet. App. 9a. She agreed with the majority that the case presented a justiciable controversy, and she "agree[d] that the record before [the court] supports a conclusion that the Forest Service has not complied with the mandates of the [NFMA] relative to even-aged management practices in adopting the Plan." *Ibid.* While believing that there were "serious questions and concerns about the management practices and policies of the Forest Service," however, she stated that she "d[id] not believe that the majority's largely undocumented broadside against the Forest Service is appropriate." *Ibid.*

Forest Service or of this Court. In light of the degree to which actual management practices have diverged from the plan's projections, the Forest Service has determined that the Wayne LRMP should be amended to reflect on-the-ground experience. In addition, the Forest Service has initiated a fresh review of its forest-planning process with the goal of revising it. The petition for a writ of certiorari should therefore be denied.

A. 1. As petitioner explains (see Pet. 8-9), the question whether forest plans are subject to judicial review in the context of a facial challenge is the subject of a conflict in the circuits. Like the Sixth Circuit in the instant case, the Seventh and Ninth Circuits have held that such a challenge is justiciable. See *Sierra Club* v. *Marita*, 46 F.3d 606, 610-614 (7th Cir. 1995); *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1513-1518 (9th Cir. 1992). Those courts have primarily relied on the premise that forest plans direct the manner in which the Forest Service will conduct subsequent site-specific activities. See *Marita*, 46 F.3d at 614 ("The Sierra Club is appealing the issuance of a final management plan which will, unless amended, direct Service management activities in" specified locations); *Mumma*, 956 F.2d at 1516 ("we must conclude that the management plan plays some, if not a critical, part in subsequent decisions"; "[t]o the extent that the plan predetermines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge").

The Eighth and Eleventh Circuits, by contrast, have held that a plan-level challenge is not ordinarily justiciable in the absence of some site-specific activity implementing the LRMP. See *Sierra Club*

v. *Robertson*, 28 F.3d 753, 757-760 (8th Cir. 1994); *Wilderness Society* v. *Alcock*, 83 F.3d 386, 389-391 (11th Cir. 1996). The Eighth Circuit concluded that "[t]he mere existence of [a] Forest Plan does not produce an imminent injury in fact" because "[a]doption of the Plan does not effectuate any on-the-ground environmental changes" or "dictate that any particular site-specific action causing environmental injury must occur." *Robertson*, 28 F.3d at 758. The Eleventh Circuit also held plan-level challenges to be generally non-justiciable. It explained that "no site-specific action will be taken pursuant to the Plan without a second stage of decisionmaking," *Alcock*, 83 F.3d at 390, and it concluded on that basis that "until a site-specific action has been proposed, appellant's claimed injury is not ripe for judicial review," *id.* at 391.[8]

In holding that the plaintiffs' plan-level challenges were non-justiciable, both the Eighth and Eleventh

[8] Both the Eighth and Eleventh Circuits recognized that the Forest Service's decisions regarding proposed site-specific activities would be subject to judicial challenge. See *Robertson*, 28 F.3d at 759; *Alcock*, 83 F.3d at 390. Both courts also recognized that judicial review of such activities could include scrutiny of the programmatic guidance contained in an LRMP, insofar as such guidance constitutes part of the agency's rationale for an individual project decision that has a concrete, on-the-ground impact. See *Robertson*, 28 F.3d at 759 (a plaintiff who will be injured by a proposed site-specific activity "may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed site-specific action is inconsistent with the governing statutes, or both"); *Alcock*, 83 F.3d at 390 (noting government's concession that the plaintiff in a suit concerning a site-specific activity "can challenge both the site-specific action as well as the Plan-level decision(s) underlying the specific action").

Circuits emphasized that the LRMPs at issue did not incorporate binding decisions regarding individual site-specific actions. See *Robertson*, 28 F.3d at 758; *Alcock*, 83 F.3d at 390-391. Neither court addressed the question whether plan provisions that *did* incorporate such binding decisions would be subject to immediate judicial review. Nothing in those courts' reasoning suggests, however, and the government does not believe, that an agency decision otherwise suitable for immediate judicial review should be immune from challenge simply because it is contained within a "plan." Cf. note 6, *supra*.[9]

2. In the government's view, the plan-level challenges presented in the instant case are not appropriate for judicial resolution. Respondents alleged that the LRMP for the Wayne National Forest (1) overemphasized timber harvesting at the expense of other uses of the forest (by designating too many acres as suitable for timber harvesting and by setting the ASQ at too high a level), and (2) improperly relied on clearcutting as the predominant method of harvesting. Those purported flaws in the Wayne forest plan cannot be said to subject respondents or their members to any injury that is "certainly impending." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990). The LRMP at issue here does not require that clearcutting must occur at all, much less that it must occur at a particular location. In rejecting the administrative appeals in this case, the Chief of the Forest Service

[9] Cf. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1164-1165 (1997) (plaintiffs had standing to challenge Fish and Wildlife Service biological opinion that changed the legal landscape under which the Bureau of Reclamation would operate, even though the opinion did not require the Bureau to undertake a particular course of action).

emphasized that the propriety of individual timber sales would be subject to site-specific inquiries in which the public would be given an opportunity to participate. See pages 7-8, *supra*.[10] Divorced from any final determination by the Forest Service that clearcutting (or other timber harvesting) should occur at a particular location, litigation regarding the plan projections challenged by respondents in this case is both premature and needlessly abstract.[11]

The Forest Service's management of the Wayne National Forest since the LRMP was adopted confirms that activities *permitted* by a forest plan will not necessarily go forward. As noted above, the ASQ under the LRMP at issue here is 75 million board feet during the first decade of the plan. Forest Service statistics indicate, however, that a total of only 29.8

[10] Congress has since enacted a law that specifically requires public notice and comment, along with a right of administrative appeal, with respect to proposed site-specific activities covered by a forest plan. See Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note). The administrative decision on appeal of any such site-specific activity would then be final agency action subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See, *e.g.*, Pub. L. No. 102-381, § 322(d)(4), 106 Stat. 1420.

[11] Since the approval of the Wayne LRMP, respondents have twice pursued successful administrative appeals challenging proposed site-specific timber harvesting activities in the Wayne National Forest. In decisions issued November 20, 1992, the Forest Supervisor concluded on each appeal that the relevant decision documents did not adequately justify the conclusion that clearcutting was the optimal method of harvest for the site in question. Thus, respondents' own experience confirms that proposed activities, even if consistent with the plan, will be subject to meaningful site-specific analysis before they are allowed to go forward.

million board feet of timber was sold in the Wayne National Forest during the years 1988-1996. See Forest Plan Estimates v. Actual Accomplishments (lodged with the Clerk of this Court). Only 2.0 million board feet of timber were sold in the forest during the four-year period from 1993 through 1996. *Ibid.* Although the plan projected that 5,075 acres would be harvested by evenaged management techniques during the first decade (Plan 4-180), only 1,540 acres were actually so harvested. See Summary of Harvest on Wayne NF from STARS Database (lodged with the Clerk of this Court) (1,434 acres harvested by clearcutting, 106 by shelterwood cutting); see also Pet. 20 n.10.[12] Thus, the plan projections that were the subject of this lawsuit had largely been overtaken by events by the time that the court of appeals issued its decision.

[12] Since 1991, each congressional appropriation for the Forest Service has provided that no appropriated funds "shall be used for timber sale preparation using clearcutting in hardwood stands in excess of 25 percent of the fiscal year 1989 harvested volume in the Wayne National Forest, Ohio." *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. II, 104 Stat. 1942 (1990). In June 1992, the Chief of the Forest Service issued policy guidance to Regional Foresters and Station Directors that was intended "to reduce clearcutting on National Forest System lands." See Memorandum from F. Dale Robertson to Regional Foresters and Station Directors, Re: Ecosystem Management of the National Forests and Grasslands, Attach. 2 (June 4, 1992). The policy limited clearcutting to specified circumstances, and the Chief forecast that "[t]his clearcutting policy combined with the new USDA-Forest Service ecosystem management can reduce clearcutting by as much as 70 percent from FY 1988 levels." *Ibid.* We have lodged a copy of that policy guidance with the Clerk of this Court.

3. For the foregoing reasons, the Sixth Circuit erred in holding respondents' plan-level challenge to be suitable for adjudication. We believe, however, that the instant case provides an inappropriate vehicle for this Court's resolution of the jurisdictional issues that have divided the courts of appeals.

a. The interlocutory posture of the case weighs against a grant of certiorari. The court of appeals held that "[t]he Forest Service's planning process * * * was not in accordance with the law," Pet. App. 8a, but it did not determine what relief should be ordered, choosing instead (see *ibid.*) to remand the case to the district court for further proceedings.[13] This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see also *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

The practical impact of plan-level adjudication depends significantly upon the scope of the relief that is ordered if a plan is found wanting. Respondents' complaint requests, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised." Pet. App. 144a. In our view, even if the court of appeals were correct that this suit is justiciable, such a remedy would be substantially overbroad. In determining whether a particular site-specific activity should go forward, the Forest Service should not be permitted to *rely* on a plan provision that the court of appeals has held to be invalid. The court of appeals' invalidation of the plan should not, however, preclude the agency from proceeding with projects that have been determined, after adequate site-specific analysis, to be consonant with applicable environmental laws. Cf. 16 U.S.C. 1604(c) ("Until such time as a unit of the National Forest System is managed under plans developed in accordance with [the Act], the management of such unit may continue under existing land and resource management plans.").

Moreover, an injunction against further timber sales and clearcutting would require a showing that the particular activities sought to be enjoined would injure respondents or their members. In the absence of any ruling below addressing the remedial question, the practical effect of the court of appeals' decision remains unclear. That uncertainty weighs against a grant of certiorari.

b. Neither petitioner nor the government contended in the district court that respondents' claims were not justiciable.[14] As a result, respondents were

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[13] On August 26, 1997, respondents filed in the district court a Renewed Motion for Summary Judgment and Injunctive Relief, with attached affidavits addressed to the issue of standing.

[14] The government first raised the jurisdictional issue in its brief to the Sixth Circuit, after the intervening decision of the Eighth Circuit in *Sierra Club* v. *Robertson*, *supra*, holding that facial challenges to forest plans are generally nonjusticiable. Petitioner did not file a brief in the court of appeals, though it submitted (and the court granted) a motion to

not called upon to submit (and the courts below had no opportunity to consider) evidence clarifying or substantiating their claims of injury and how those claims are tied to the Wayne LRMP and its relationship to the Forest Service's on-the-ground decisions. The failure of both petitioner and the government to raise their justiciability objections at the outset of the lawsuit may impede this Court's consideration of those issues, and may therefore render this case, in its current posture, an unsuitable vehicle for resolution of the first question presented in the petition.[15]

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join in and adopt the arguments of the government. See note 6, *supra*. Petitioner first separately addressed the question of justiciability in its petition for rehearing with suggestion of rehearing en banc.

[15] The complaint in this case alleged that members of respondent organizations "visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging of trees as a result of the defendants' unlawful practices regarding below cost timber sales." Pet. App. 134a-135a. The phrase "subject to" is presumably intended to mean "potentially subject to" or "identified as suitable for." Although the Wayne LRMP set out a schedule of specific timber sales projected for the first three years (1988-1990) of the plan, see Plan A-2 to A-6, respondents did not allege that their members used those or any other identified tracts. Compare *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 887, 889 (1990) (*NWF*). Indeed, respondents' complaint, filed March 18, 1992 (see Pet. App. 133a), contained no allegations regarding identified sales that had actually gone forward. Because neither petitioner nor the government argued in the district court that respondents' claims were not justiciable, respondents were not called upon in the initial proceedings in the district court to clarify, or to support with evidentiary materials, their general claims of injury. Compare *NWF*, 497 U.S. at 889 (general allegations of injury

c. As we explain above (see pages 16-17, *supra*), the quantity of timber harvested under the 1988 LRMP for the Wayne National Forest has been substantially less than the amount projected in the plan. That disparity reinforces the government's view that respondents' plan-level challenge should not have been adjudicated. At the same time, however, the manner in which on-the-ground experience has diverged from the LRMP's projections suggests that prolonged litigation concerning the now-dated forest plan would not be an efficient use of the resources of the Forest Service or of this Court. Accordingly, the Forest Supervisor for the Wayne National Forest has "decided to amend the Wayne National Forest Land and Resource Management Plan (Forest Plan) to bring its vegetation management projections into conformance with what has happened on the ground since the 1988 Forest Plan approval and with what is expected to happen in the future." Letter from José A. Zambrana (Aug. 29, 1997) (lodged with the Clerk of

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that may be sufficient at the pleading stage are inadequate to survive motion for summary judgment); *Bennett* v. *Spear*, 117 S. Ct. at 1163-1164 (same).

As we explain above (see pages 18-19, *supra*), questions concerning the appropriate scope of relief in this case also remain open to the district court on remand. Any injunction against timber harvesting activities should be limited to projects that would cause concrete harm to respondents or their members. Respondents' Renewed Motion for Summary Judgment and Injunctive Relief is currently pending before the district court on remand, and respondents have submitted affidavits directed to the issue of standing. See note 13, *supra*. Thus, the proceedings on remand may clarify the extent to which respondents are actually likely to suffer injury as a result of activities conducted under the Wayne LRMP.

this Court). The Forest Supervisor explained that "it is now clear that the facts underlying the dispute over the Wayne National Forest Plan have substantially changed and that continuing to litigate over decade old projections is fruitless." *Ibid.*

The instant case involves a challenge to federal administrative action. The Forest Service is the principal party in interest; petitioner's stake in the litigation is largely derivative. In light of the Forest Service's undertaking to bring the now-outdated controversy regarding the 1988 plan to a close as expeditiously as possible, review by this Court is not warranted.

4. In declining to adjudicate plan-level challenges, the Eighth and Eleventh Circuits have relied on the fact that existing LRMPs typically do not incorporate final decisions regarding individual site-specific actions. See *Robertson*, 28 F.3d at 758 ("Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action * * * must occur."); *Alcock*, 83 F.3d at 390 ("no site-specific action will be taken pursuant to the Plan without a second stage of decisionmaking"). Nothing in the NFMA, however, would prohibit the Forest Service from altering its planning process so that a greater range of binding determinations would be made at the programmatic level. The Forest Service has recently initiated a fresh reexamination of the regulatory provisions governing the formulation of LRMPs. Pursuant to the Federal Advisory Committee Act, the Forest Service recently established a charter for a Committee of Scientists "to provide scientific and technical advice to the Secretary of Agriculture and the Chief of the Forest Service on improvements that can be

made to the land and resource management planning process." 62 Fed. Reg. 43,691 (Aug. 15, 1997).[16] Thus, it is unclear whether any decision this Court might render concerning the reviewability of existing forest plans would address the sort of ripeness and standing issues that may arise in the future by virtue of changes in the planning process.

B. The court of appeals held that the LRMP for the Wayne National Forest was arbitrary and capricious because it "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. In the view of the court of appeals, the Wayne LRMP's projections concerning the anticipated use of evenaged management violated a purported NFMA requirement that "even-aged management techniques will be used only in exceptional circumstances." *Ibid.* In support of that proposition, however, the court of appeals relied (see *ibid.*) on 16 U.S.C. 1604(g)(3)(F)(v), which states only that even-aged management techniques must be "carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource."

In *Sierra Club* v. *Espy*, 38 F.3d 792, 799 (5th Cir. 1994), the Fifth Circuit stated that

> the Forest Service may use even-aged management as an overall management strategy. That even-aged management must be the optimum or appropriate method to accomplish the objectives and requirements set forth in an LRMP does not

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[16] The Forest Service had previously issued a notice of proposed rulemaking regarding possible changes in the forest planning process on April 13, 1995. See 60 Fed. Reg. 18,886.

> mean that even-aged management is the exception to a rule that purportedly favors selection management. Similarly, the requirement that even-aged logging protect forest resources does not in itself limit its use. Rather, these provisions mean that the Forest Service must proceed cautiously in implementing an even-aged management alternative and only after a close examination of the effects that such management will have on other forest resources.

After reviewing the Act's legislative history, the Fifth Circuit concluded that "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances; it requires that the Forest Service meet certain substantive restrictions before it selects even-aged management." *Id.* at 800.

The Sixth Circuit did not explain its determinations that evenaged management techniques may be employed "only in exceptional circumstances," or that the Forest Service had improperly "utilize[d] even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. The court of appeals' disapproval of the Wayne LRMP may have been based on the fact that the plan "provide[d] for even-aged management on 80 percent of the suitable forest land." ROD 18; see Pet. App. 2a ("The plan designated that eighty percent of all timbering techniques would be 'even-aged management.'"). The court's opinion could be read to hold that a forest plan which identifies evenaged management as the anticipated primary method of timber harvesting is *ipso facto* violative of the NFMA. If that was the ground for the Sixth Circuit's invalidation of the Wayne

LRMP, its ruling is squarely in conflict with the Fifth Circuit's decision in *Sierra Club* v. *Espy* and has no basis in the NFMA, which neither explicitly nor implicitly requires that unevenaged management must be used as the predominant method of timber harvesting, either within a particular forest or in the National Forest system as a whole. As explained above, evenaged management need only be "carried out in a manner" that is "consistent" with protection of various resources and regeneration of the timber resource.

Such an "exceptional circumstances" rule, moreover, could have a very substantial impact upon the Forest Service's management of public lands. Under that approach, a forest plan that projected that even-aged management would be used as the predominant method of timber harvesting could be deemed unlawful on that basis alone. Indeed, quite apart from plan-level challenges, the Forest Service could be found (under the approach described above) to be in violation of the NFMA whenever it used evenaged management as the primary harvesting method on a particular forest, even if each individual timber sale was supported by precisely the determinations required by the Act. If the Sixth Circuit had unambiguously adopted that position, its decision might well warrant review by this Court.

The Sixth Circuit's opinion is, however, susceptible of a narrower construction. The court's reference to "exceptional circumstances" could be construed as essentially a restatement of the statutory requirement that use of evenaged management must be premised on specific findings that are not required for unevenaged techniques. See 16 U.S.C. 1604(g)(3)(F). In asserting that the Wayne LRMP employed even-

aged management "as if it were the statutory rule," the court of appeals might have meant that the agency had failed adequately to support its projection that a substantial majority of the suitable acreage could appropriately be harvested through the use of even-aged methods. We would not agree with that assessment of the Wayne LRMP: in our view, the Forest Service adequately explained and supported its projections based on the information available to it at the time the plan was issued. But any error that the court of appeals may have committed in applying Section 1604(g)(3)(F) to a particular set of facts would raise no issue of general importance warranting this Court's review. We believe that the district court on remand should be given the initial opportunity to construe and apply the Sixth Circuit's opinion.[17]

C. Given the uncertainty regarding the full scope and impact of the court of appeals' opinion on the merits, the interlocutory posture of the case (see pages 18-19, *supra*), the dearth of record evidence bearing on respondents' claims of injury (see pages 19-20, *supra*), the limited current importance of the validity of the Wayne LRMP's projections (see pages

[17] The government's petition for rehearing with suggestion of rehearing en banc asserted that "[t]he panel's holding in this case is in direct conflict with the law of the Fifth Circuit on the interpretation of [16 U.S.C. 1604]." Gov't Pet. for Reh'g 12. On further consideration, we believe that statement to have been too unequivocal and thus ill-advised, at least at this interlocutory juncture. The Sixth Circuit's opinion is certainly susceptible of a construction that would place that court directly in conflict with the Fifth Circuit. We now believe, however, that the Sixth Circuit's opinion is susceptible of a narrower construction as well, and further proceedings in this case may shed light on that question.

21-22, *supra*), and the Forest Service's initiation of a process to reexamine the manner in which forest planning is conducted (see pages 22-23, *supra*), review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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